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No. 80-1924

In the Supreme Court of the United States

OCTOBER TERM, 1981

CASPAR W. WEINBERGER, SECRETARY OF DEFENSE, ET AL., PETITIONERS

v.

ANTHONY M. ROSSI, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

REPLY BRIEF FOR THE PETITIONERS

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TABLE OF AUTHORITIES

Cases:	Page
Chapman v. *Houston Welfare Rights Organization*, 441 U.S. 600	2
Dames & Moore v. *Regan*, No. 80-2078 (July 2, 1981)	2
Federal Republic of Germany, ex rel. Armed Forces of the United States v. *Works Council of the United States Military Community*, File No. 6 (A.B.R. 74/78) (BArbGE July 23, 1981)	5-6
Goldwater v. *Carter*, 444 U.S. 996	4, 5
Youngstown Sheet & Tube Co. v. *Sawyer*, 343 U.S. 579	2
Treaties and statutes:	
Agreement Between the Parties to the North Atlantic Treaty Organization Regarding the Status of Their Forces, June 19, 1951, 4 U.S.T. 1792, T.I.A.S. No. 2846	5
Agreement Implementing Article V of the Treaty of Friendship and Cooperation, United States-Spain, Jan. 31, 1976, 27 U.S.T. 3095, T.I.A.S. No. 8361	8
Base Labor Agreement with the Republic of the Philippines, May 27, 1968, 19 U.S.T. 5892, T.I.A.S. No. 6542	2
Mutual Defense Treaty Between the United States and the Republic of China, Dec. 2, 1954, 6 U.S.T. 433, T.I.A.S. No. 3178	5
Supplementary Agreement to the North Atlantic Treaty Organization Status of Forces Agreement, Aug. 3, 1959, 14 U.S.T. 531, T.I.A.S. No. 5351	5
Case Act, 1 U.S.C. (& Supp. III) 112b	7
22 U.S.C. 1392	2
Pub. L. No. 92-129, Section 106, 85 Stat. 355, codified at 5 U.S.C. 7201 note	*passim*
Miscellaneous:	
117 Cong. Rec. (1971):	
pp. 14394-14397	3
p. 14395	6

Miscellaneous—Continued

	Page
p. 16126	6
p. 16128	3
p. 16132	4
p. 16133	3, 4
118 Cong. Rec. 6867 (1972)	8
127 Cong. Rec. S14110 (daily ed. Nov. 30, 1981)	10, 12
11 Foreign Affairs Manual, Chapter 700 (Oct. 25, 1974)	8
H.R. 4995, 97th Cong., 1st Sess. (1981)	10
H.R. Rep. No. 95-68, 95th Cong., 2d Sess. (1977)	9
H.R. Rep. No. 95-1398, 95th Cong., 2d Sess. (1978)	9
H.R. Rep. No. 97-410, 97th Cong., 1st Sess. (1981), *reprinted in* 127 Cong. Rec. H9560 (daily ed. Dec. 15, 1981)	9
S. Rep. No. 92-632, 92d Cong., 2d Sess. (1972)	7
S. Res. 214, 92d Cong., 2d Sess., 118 Cong. Rec. 6870 (1972)	7, 8

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Respondents and amici go to great lengths (see Resp. Br. 26-35; AFGE Br. 7-14) to establish the many occasions on which this Court, the Executive Branch, Congress, "scholars and international law experts" have used the word "treaty" in its Article II sense. We have no quarrel with the specific instances cited by respondents and amici, or with respondents' assertion (Br. 27 n.61) that there are "[o]ther examples * * * too numerous to fully catalogue." Our contention throughout (see Pet. Br. 15-24), however, has been that the use of the word "treaty" in Section 106 cannot be deemed presumptively to refer to an international agreement that is submitted to the Senate for the concurrence of two-thirds of its members. Rather, "[a]s in all cases of

statutory construction," the term "treaty" must be interpreted "in light of the purposes Congress sought to serve." *Chapman* v. *Houston Welfare Rights Organization*, 441 U.S. 600, 608 (1979). The question presented by this case is thus purely one of legislative intent: whether, by the enactment of Section 106, Congress meant to place the United States in breach of its Base Labor Agreement with the Republic of the Philippines, 19 U.S.T. 5892, T.I.A.S. No. 6542 (May 27, 1968) ("BLA"), and to cast doubt on several other binding international agreements that permit this country to maintain a military presence on foreign soil (see Pet. Br. 5-6 n.3).[1]

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[1] To be sure, Congress has the power to mandate such a result. The issue is whether it intended to exercise that authority when it enacted Section 106.

Moreover, it begs the question to assert, as respondents do (Br. 36, quoting *Youngstown Sheet & Tube Co.* v. *Sawyer*, 343 U.S. 579, 637 (1952) (Jackson, J., concurring)), that "[t]his case presents a situation where the power of the Executive is 'at its lowest ebb.' " Only if it were already concluded that Congress, by the enactment of Section 106, in fact intended to deny the President the power to afford local national hiring preferences in international agreements other than Article II treaties would the Executive, in entering into such agreements, be "act[ing] in contravention of the will of Congress" and would " 'his power,' " therefore, be, " 'at its lowest ebb.' " *Dames & Moore* v. *Regan*, No. 80-2078 (July 2, 1981), slip op. 10, quoting *Youngstown Sheet & Tube Co.* v. *Sawyer*, *supra*, 343 U.S. at 637.

By contrast, if it is assumed that Congress did not intend to upset at least 12 binding international agreements by its enactment of Section 106, it becomes clear that the President, by entering into the Base Labor Agreement pursuant to 22 U.S.C. 1392 (see Pet. Br. 3), "act[ed] pursuant to an express * * * authorization by Congress" (*Youngstown Sheet & Tube Co.* v. *Sawyer*, *supra*, 343 U.S. at 635) and that, therefore, his action is entitled to "the strongest of presumptions

1. a. Respondents' primary contention (Br. 9 & n.9) is that a construction of the word "treaty" that encompasses all binding international agreements to which the United States is a party would render Section 106 a "nullity" and "totally frustrate the purpose of Congress." Respondents err at the outset, however, by characterizing Congress' purpose as the "*eliminati*[*on*] [of] discrimination against American citizens" on Department of Defense facilities abroad (Br. 7 (emphasis added); see also *id.* at 5, 8, 36). Had Congress intended the total eradication of local national preferences, in favor of the employment solely of United States citizens and dependents, on military bases abroad, it would not have included a "treaty" exception of any sort.

Moreover, construing the "treaty" exception in Section 106 as including all binding international agreements to which the United States is a party would not permit that exception to " 'engulf the general rule' " (Resp. Br. 11, quoting Pet. App. 18a). To be sure, the Phipps incident (see Pet. Br. 35-38) was the only specific example of an individual military commander ordering discrimination against United States citizens and dependents in employment on military bases that was cited in the debates on Section 106 (117 Cong. Rec. 14394-14397, 16128, 16133 (1971) (remarks of Sen. Schweiker)), and there were indications that that situation already was being remedied (*id.* at 16133). Nevertheless, the legislative history suggests that Section 106 was intended to protect against the occurrence of similar incidents elsewhere or a recurrence of the situation at a sub-

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and widest latitude of judicial interpretation, and the burden of persuasion would rest heavily upon any who might attack it" (*id.* at 687).

sequent date.[2] Indeed, the memorandum that was intended to remedy the Phipps situation was only sent "to Germany and to European forces" and applied only to "nonappropriated fund activities" (117 Cong. Rec. 16133 (1971) (remarks of Sen. Schweiker)).[3]

b. Respondents also contend (Br. 5, 13) that the different treatment, for employment purposes, accorded United States citizens and foreign nationals is the result of the classification of certain jobs as "local national" positions. Because, according to respondents (Br. 3-5, 8, 13-14), such classifications are only made by way of international agreements, Congress' enactment of Section 106 must have been directed against non-Article II treaties that contain local national employment preferences, rather than against actions of individual commanders, such as that of General Phipps.[4]

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[2] Even the court of appeals recognized (Pet. App. 12a-13a) that "Congress undoubtedly may have wished to prevent situations of this kind from arising in the future."

[3] "Nonappropriated fund activities" are programs that are not funded by Congress, such as the Army and Air Force Exchange facilities.

[4] Contrary to respondents' implication (Br. 10 n.15), there is no inconsistency between, on the one hand, our reliance here (Pet. Br. 37) on Senator Schweiker's remark (117 Cong. Rec. 16132 (1971)) that "[j]ust a simple Executive order would change this" and, on the other hand, our argument in *Goldwater* v. *Carter*, 444 U.S. 996 (1979), that "the President has broad constitutional authority to terminate the Nation's treaty obligations, without seeking formal approval or acquiescence from Congress" (Br. in Opp. 8). As we explained in our opening brief (at 37), Senator Schweiker's remark indicates that he viewed Section 106 as directed against employment preferences established by individual base commanders,

The Agreement Between the Parties to the North Atlantic Treaty Organization Regarding the Status of Their Forces, June 19, 1951, 4 U.S.T. 1792, T.I.A.S. No. 2846 (NATO SOFA), however, the only international agreement even alluded to in the debates on Section 106, contains no classification of jobs as "local national" positions or otherwise. Article IX, paragraph 4 of the NATO SOFA, 4 U.S.T. 1810, merely provides that once a "sending State" (the state to which the military force belongs) determines to hire local nationals, local law must govern the terms and conditions of the local national's employment.[5]

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rather than local national hiring preferences provided for by international agreements because, while an Executive Order would have sufficed to overrule a directive by an individual commander like General Phipps, it would not have relieved the United States of its obligations under any form of international agreement. This is not inconsistent with our position in *Goldwater* v. *Carter*, because the treaty involved there, the Mutual Defense Treaty Between the United States and the Republic of China, Dec. 2, 1954, 6 U.S.T. 433, T.I.A.S. No. 3178, contained a provision expressly permitting "[e]ither Party [to] terminate it one year after notice has been given to the other Party." 6 U.S.T. at 437, art. X. The result of including such a provision is that termination of the treaty not only nullifies it for domestic purposes, but also ends the international obligations created by the treaty.

[5] This provision is implemented in Germany by article 56 of the Supplementary Agreement to the North Atlantic Treaty Organization Status of Forces Agreement, Aug. 3, 1959, 14 U.S.T. 531, 593-596, T.I.A.S. No. 5351, which incorporates the applicable German labor laws in detail.

Contrary to respondents' characterization of it (Br. 4 n.3, 9 n.8), the decision of Germany's Federal Supreme Labor Court in *Federal Republic of Germany, ex rel. Armed Forces of the United States* v. *Works Council of the United States*

Moreover, as the controversial Phipps memorandum itself makes clear (see 117 Cong. Rec. 14395 (1971) (remarks of Sen. Schweiker)), prior to the action taken by General Phipps, positions that were designated "local national" were also available to United States citizens and dependents: "[T]he [European Exchange System] presently employs approximately 4,000 full and part time U.S. citizens in positions such as salesclerk, buffet attendant and secretary, which would normally be filled by local national employees." Accordingly, contrary to respondents' assertions (Br. 9 n.11, 14 n.27), it was indeed General Phipps' directive calling for the replacement of United States citizens by local nationals in EES jobs that rendered those positions unavailable to Americans. See 117 Cong. Rec. 14395 (1971) (remarks of Sen. Schweiker). In sum, respondents' reliance on the references in the debates to "local national" classifications advances their position no further than does Senator Hughes' isolated reference (117 Cong. Rec. 16126) (1971)) to "agreement[s] with the countries in which they are located" (see Pet. Br. 39-40).

2. Contrary to respondents' and amici's bare assertions (Resp. Br. 16-20; AFGE Br. 17), there is no suggestion in the legislative history of Section 106 that Congress enacted that statute "as one response

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Military Community, File No. 6 (A.B.R. 74/78) (BArbGE July 23, 1981) (translated copy lodged with the Clerk of this Court), did not deal with the rights of Germans employed at United States facilities, but rather involved the inapplicability of German law to an American dependent employed in a "local national" position at United States facilities located in the Federal Republic of Germany.

to its concern that the President's use of international executive agreements enabled him to act in the area of foreign affairs without the knowledge of the legislative branch of government." As we explained in our opening brief (at 34-35), Section 106 arose not in the context of a struggle between the executive and legislative branches for control of the conduct of the Nation's foreign affairs, but rather in the context of legislation calling for increases in military pay to offset the economic hardship suffered by many American service members overseas and to attract volunteers to the proposed All-Volunteer Forces. Nowhere in the debates or reports on Section 106 is there any hint of concern with the President's alleged use of executive agreements to exclude Congress from the conduct of foreign affairs. Accordingly, and for the reasons noted in our opening brief (at 41 n.25), respondents' and amici's reliance (Resp. Br. 17-18; AFGE Br. 17-18, 20) on Congress' use of the word "treaty" in the Case Act, 1 U.S.C. (& Supp. III) 112b, does not avail them here.

Nor does S. Res. 214, 92d Cong., 2d Sess., 118 Cong. Rec. 6870 (1972), also relied on by respondents (Br. 18-20) and amici (AFGE Br. 19-20), shed light on the meaning of the word "treaty" in Section 106. Senate Resolution 214 would have "place[d] on record the view of the U.S. Senate that '[a]ny agreement with Portugal or Bahrain for military bases or foreign assistance should be submitted as a treaty to the Senate for advice and consent.'" S. Rep. No. 92-632, 92d Cong., 2d Sess. 1 (1972). That view, however, rested primarily on the Senate's perception that the agreements at issue dealt with matters of major policy importance, including the possibility of commitments of

United States forces and foreign assistance funds (118 Cong. Rec. 6867 (1972) (remarks of Sen. Case)). Under the Department of State's own Circular 175 Procedures (see Pet. Br. 33 n.23), international agreements that obligate the United States, under specified circumstances, to commit United States forces and to provide foreign assistance generally require the advice and consent of the Senate. In many cases, however, agreements involving the possible commitment of military forces that are approved by the Senate as Article II treaties are further implemented by executive agreements. Indeed, details such as labor preferences for local nationals frequently are dealt with in the form of such implementing executive agreements. See, *e.g.*, Agreement Implementing Article V of the Treaty of Friendship and Cooperation, United States-Spain, Jan. 31, 1976, 27 U.S.T. 3095, 3128, T.I.A.S. No. 8361, (art. XXXIII).

Moreover, the language employed in S. Res. 214 hardly supports respondents' construction of the word "treaty" in Section 106 as limited to Article II treaties. Rather, the wording of the resolution —that "any agreement * * * should be submitted as a treaty to the Senate for advice and consent"—provides one more example of Congress' ability to be quite explicit when it intends to refer only to Article II treaties (see Pet. Br. 21-22; see also *id.* at 22 n.14, 41 n.25). Congress employed no such precision in its drafting of Section 106.

3. Respondents rely (Br. 21-24) on post-enactment exhortations by Congress to the Executive Branch to review and attempt to renegotiate existing agreements in order to enhance employment opportunities for United States citizens abroad as evidence

that Congress disagrees with a construction of the word "treaty" in Section 106 that includes all binding international agreements to which the United States is a party. To the contrary, however, those very admonitions on which respondents rely *assume* the continued existence and vitality of non-Article II treaties containing local national employment preferences notwithstanding the enactment of Section 106.[6] Nowhere in the post-enactment legislative history relied on by respondents (Br. 21-24) did any member of Congress urge the Department of Defense to increase its employment of United States citizens on military bases abroad on the ground that its continued employment of local nationals pursuant to non-Article II treaties violated Section 106. Thus, as we explained in our opening brief (at pages 41-43), the relevant post-enactment legislative history confirms that Congress

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[6] See, *e.g.*, H.R. Rep. No. 97-410, 97th Cong., 1st Sess. 54 (1981), *reprinted in* 127 Cong. Rec. H9560, H9575 (daily ed. Dec. 15, 1981) (emphasis added) ("DoD should take every possible action including renegotiation of *existing* agreements if necessary in order to enhance the employment opportunities for U.S. citizens living in overseas areas"); H.R. Rep. No. 95-1398, 95th Cong., 2d Sess. 80 (1978) (emphasis added) ("[t]he United States and the host country *have* administrative agreements (referred to as Status of Forces Agreements) which define and prescribe requirements that the military departments *are obligated* to observe in satisfying their local civilian labor needs"); H.R. Rep. No. 95-68, 95th Cong., 2d Sess. 24 (1977) (same); H.R. Rep. No. 95-1398, *supra*, at 81 ("[t]he committee urges the Department of Defense to continue the policy of converting foreign national positions to U.S. dependents *when feasible and as vacancies occur*"); H.R. Rep. No. 95-68, *supra*, at 25 ("[t]he committee believes that the Department of Defense should *review all of these agreements and attempt to renegotiate* those which provide little or no flexibility to the military service to employ the type of labor which it believes to be lowest in cost, most efficient, or necessary for the welfare and morale of its personnel").

in international agreements that have not been submitted to the Senate

is aware that the inclusion of local national employment preferences has continued since the enactment of Section 106 and has taken no action to alter that situation.[7]

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[7] Congress most recently refused to alter the present situation in December 1981, when the Conference Committee on H.R. 4995, 97th Cong., 1st Sess. (1981), the Department of Defense Appropriations Bill for 1982, deleted a House provision (Section 777) that would have prohibited the hiring of foreign nationals for overseas positions when qualified United States citizens were available overseas to perform the work. See H.R. Rep. No. 97-410, *supra, reprinted in* 127 Cong. Rec. H9575 (daily ed. Dec. 15, 1981). In urging the deletion of the provision on the floor of the Senate, Senator Percy, Chairman of the Senate Foreign Relations Committee, emphasized the negative international consequences the enactment of such a provision might have (127 Cong. Rec. S14110 (daily ed. Nov. 30, 1981)):

> The enactment into law of section 777 of the House bill would place the United States in violation of its obligations under international agreements and international law. U.S. agreements with the Governments of the Philippines, Spain, Turkey, Iceland, and the United Kingdom, among others, granting the United States the right to use military facilities in these countries all require that local nationals be given some form of hiring preference for those positions not occupied by U.S. military personnel or U.S. civil servants.
>
> * * * * *
>
> Some host nations might view enactment of 777 as a material breach of our agreements, thus entitling them to open negotiations on terminating, redefining or further restricting U.S. basing and use rights. Nations could, for example, retaliate by suspending or reducing our current rights to engage in routine military operations such as aircraft transits.
>
> U.S. violation of international agreement and international law through adoption of section 777 would make it more difficult to obtain future base or facility rights from other countries. In addition, as the United States

4. Finally, contrary to respondents' expectations (Br. 6-7), affirmance by this Court of the court of appeals' decision would not necessarily result in the employment of respondents or any other United States citizen or dependent in overseas positions for which, under binding international agreements, the United States is committed to employ local nationals. The only rights that a "sending" country enjoys in a "receiving" or "host" country are those granted by the host country, usually in the form of agreements between the two countries. The agreements between the United States and the Philippines, however, contain no provision for the United States to fill its needs for civilian employment on the Philippine bases with United States citizens "except when the needed skills are * * * not * * * locally available, or when otherwise necessary for reasons of security or special management needs" (Pet. App. 51a). Accordingly, in an attempt to comply both with international law, which precludes the hiring of Americans when Philippine citizens are available, and with United States law, which, if the decision below is not reversed, would prohibit the hiring of Philippine citizens when American citizens are available, the positions may

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could be in violation of its own law by hiring host-country nationals or in violation of international law by hiring U.S. nationals we would be unable, as a practical matter, to hire anyone other than military or civil service employees of the U.S. Government. The result would be an important reduction of our ability to perform security functions.

Because none of the agreements Senator Percy cited is an Article II treaty (see Pet. Br. 5-6 nn.3-4), his remarks reflect an understanding that such agreements, including their local hiring preference provisions, remain in force today despite the passage of Section 106.

have to remain vacant, to the detriment of our military preparedness, support and morale. Cf. 127 Cong. Rec. S14110 (daily ed. Nov. 30, 1981) (remarks of Sen. Percy), quoted at pages 10-11, note 7, *supra*.[8]

For the reasons stated above and in our opening brief, the judgment of the court of appeals should be reversed.

Respectfully submitted.

REX E. LEE
Solicitor General

FEBRUARY 1982

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[8] Contrary to respondents' repeated charges (Br. 6, 35, 41-43), we note the possible international consequences of the decision in this case not for the Court's review of the merits of the policies involved, but rather for its determination whether Congress *intended*, by Section 106, to bring about such drastic results.

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